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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PHILLIP T. SZANTO, Plaintiff and Respondent, v. PETER SZANTO, Defendant and Appellant.	G039594 (Super. Ct. No. 05CC08539) O P I N I O N

Appeal from an order of the Superior Court of Orange County, James J. DiCesare, Judge and Eleanor M. Palk, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Peter Szanto, in pro. per., for Defendant and Appellant.

Robert S. Lewin for Plaintiff and Respondent.

Peter Szanto appeals from a post-judgment order denying his claim for attorney fees pursuant to Civil Code section 3344[1], following his successful defense in the trial court of claims brought against him by his son, Phillip.

Unfortunately for Peter, his victory was short-lived, as we subsequently reversed the judgment on appeal, and remanded the case for further proceedings on one cause of action – styled "identity theft," but actually amounting to conversion – on which the trial court had sustained a demurrer without leave to amend.

We now conclude the trial court's challenged order was rendered moot by our prior opinion reversing the judgment in Peter's favor. Because there is no longer a judgment in place, Peter does not qualify as the "prevailing party" under section 3344, and we consequently could not afford him relief from the denial of his fee claim even if we otherwise agreed with his attempt to apply that statute to the allegations asserted by Phillip in this case.

Despite that conclusion, we nonetheless exercise our discretion to decide the issue now, for the simple reason that it is so easily resolved that the interests of judicial efficiency militate in favor of doing so, to forestall even a slight chance the issue would recur, and once again work its way through the trial court and back to us at a future time. Stated plainly, we find no merit in Peter's appeal. Section 3344, the statute upon which he relies to support his fee claim, applies only to a cause of action involving alleged misappropriation of "another's name, voice, signature, photograph, or likeness, in any manner, *on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services . . . .*" (§ 3344, subd. (a), italics added.) No such claim was asserted by Phillip in this case, and consequently, no award of fees could have been properly made to Peter pursuant to the statute. The order is affirmed.

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1 All further statutory references are to the Civil Code unless otherwise indicated.

FACTS

Peter and Phillip are father and son. In July of 2005, Phillip filed a complaint alleging several causes of action against Peter, including one styled "identity theft," alleging that Peter had opened various bank accounts and credit accounts, aggregating in excess of $500,000, in Peter's name and under his social security number; and had amassed debt in Phillip's name, aggregating over $120,000. These accounts were allegedly opened, and the debt incurred, without Phillip's knowledge or consent.

Phillip also alleged Peter had filed tax returns in his name and under his social security number for tax years 2001-2003, all without his knowledge or consent. Moreover, Phillip further alleged he had been contacted by an attorney employed by a law firm specializing in class action lawsuits, who informed him he was identified as the lead plaintiff in a "multi-million dollar securities" class-action litigation. Phillip had no prior knowledge of this litigation, and had not agreed to be the lead plaintiff. In a conversation with that same attorney, Phillip also learned he had been the plaintiff in a case litigated in Riverside County, again without his consent.

Phillip alleged, based upon specific circumstantial evidence, that Peter had carried out each of these alleged acts amounting to the "theft" of Phillip's identity, conduct which is proscribed by Penal Code section 530.5(a).[2] Phillip sought orders immediately freezing the disputed accounts, restraining Peter from engaging in further such acts during the pendency of the litigation, and declaring a constructive trust over the accounts. Phillip also alleged that as a direct and proximate cause of Peter's actions, he had suffered personal injuries including emotional distress, as well as economic damages.

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[2] Penal Code 530.5, subdivision (a), provides as follows: "Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment in the state prison."

The court ultimately sustained a demurrer, without leave to amend, to this "identity theft" cause of action. Other causes of action between the parties, including one alleging Peter invaded Phillip's privacy by using his identity to conduct financial transactions, proceeded to trial. Peter prevailed on each of the claims at trial, and a judgment was subsequently entered in his favor.

After the judgment was entered, Peter moved for an award of attorney fees pursuant to section 3344, which governs the unauthorized use of another's "name, voice, signature, photograph, or likeness, in any manner, *on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services* . . . ." (§ 3344, subd. (a), italics added.) Peter claimed that Phillip's claims involving the use of his identity without authorization stated a claim for relief under the statute, and thus entitled Peter to an award of attorney fees as a "prevailing party" on such a claim. The court denied the request, noting that "[t]he pleadings do not state such a claim and the facts of the case were not in regard to advertising, selling or soliciting."

Phillip appealed from the judgment, arguing the trial court had erred in sustaining a demurrer, without leave to amend, to his cause of action for "identity theft." Peter then separately appealed from the post-judgment order denying his fee claim. The appeals were not consolidated or coordinated. We subsequently determined Phillip's appeal from the judgment was meritorious, reversed that judgment and remanded the case for further proceedings on Phillip's identity theft claim (*Szanto v. Szanto* (Oct. 29, 2008, G039194) [nonpub. opn.].)

Meanwhile, this separate appeal from the court's denial of Peter's post-judgment attorney fee claim was fully briefed and scheduled for argument. We invited the parties to submit supplemental briefs on the issue of whether the issue was moot in light of our earlier reversal of the judgment. Only Peter submitted a supplemental brief.

DISCUSSION

We start with the proposition that "[a]n appeal should be dismissed as moot when the occurrence of events renders it impossible for the appellate court to grant appellant any effective relief." (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479, citing *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541.)

In this appeal, Peter is asking us to reverse a trial court ruling denying him fees as the "prevailing party" on a claim asserting he had improperly used his son's name or signature in connection with "products, merchandise or goods." But the judgment upon which Peter relied to support that fee claim has now been reversed, and the case has been remanded to the trial court for further proceedings involving the very "identity theft" allegations on which Peter had relied for the basis of his claim. Even if we agreed with his interpretation of the relevant statute, and with his characterization of the allegations contained in Peter's complaint, we could not reverse the fee order, because until the claim is tried on remand, or there is some other resolution of the relevant allegations, there is simply no "prevailing" party.

Because we could afford Peter no effective relief as the case currently stands, we have no choice but to conclude the order appealed from is now moot. Of course, Peter contends otherwise, but his primary contention regarding mootness is that this appeal could not have been mooted by our earlier reversal of the judgment because, in a nutshell, that earlier opinion was wrong. Peter accuses us of "failing to apply the law of sustained demurrers," and suggests that that our opinion was improper, because a reviewing court cannot "summarily disprove and reject a jury's verdict prior to examining every aspect of that verdict and every piece of evidence and law that was presented to that jury[.]" He also questions whether "a reviewing court [can] set aside a

jury's special verdict for the special benefit of a senior member of the bar[3] regardless of failing to identify any miscarriage of justice in the appeal it has considered." Needless to say, we cannot agree with Peter's characterization of our prior opinion, and thus do not accept his implied assertion that it should simply be ignored for purposes of determining the mootness of this current appeal.

The only remaining issue is whether we should exercise our discretion to decide the issue notwithstanding its mootness. "[T]here are three discretionary exceptions to the rules regarding mootness: (1) when the case presents an issue of broad public interest that is likely to recur (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1202, fn. 8); (2) when there may be a recurrence of the controversy between the parties (*Grier v. Alameda-Contra Costa Transit Dist.* (1976) 55 Cal.App.3d 325, 330); and (3) when a material question remains for the court's determination (*Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 205)." (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga, supra*, 82 Cal.App.4th at pp. 479-480.)

Of the three discretionary exceptions, only one arguably applies – the possibility that the issue will recur if Peter once again prevails in the trial court. But there is no telling at this point how likely that is to happen, and as a general rule we do not pre-decide legal issues that have yet to be finally resolved below, and which may never again become ripe for decision on appeal. To be clear, this is not a case in which the issue will recur no matter which party prevails on remand. As part of his opposition to Peter's fee claim, Phillip expressly eschewed any intent to state a cause of action under section 3344, and we consequently do not anticipate that he would assert such a claim if he were to prevail on his "identity theft" claim in a future trial.

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3 Peter does not identify the "senior member of the bar" whose favor he is implying this court might have been attempting to curry with its prior opinion. We can only assume he means opposing counsel. Insulting the court is a remarkably ineffective appellate technique.

On the other hand, this appears to be a case in which even the slight chance of recurrence might be enough to justify our exercise of discretion, for the simple reason that the issue can be so easily resolved now. If there is even a slight chance that Peter will prevail again, and once again assert an identical fee claim in the trial court (and then on appeal), the interests of judicial efficiency would be served by putting the issue to rest now. And so we shall.

Section 3344, subdivision (a) provides in pertinent part that "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. . . . The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."

In this case, Phillip did not allege that Peter used his identity "on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services. . . ." Nor does Peter cite us to any evidence suggesting that Phillip actually attempted to pursue any such claim at trial. Instead, Peter simply asserts, in conclusory fashion, that Phillip intentionally "left [his] pleading sufficiently amorphous, confusing, perplexing and ambiguous to later allow additional allegations by the words 'including, but not limited to'" and that his "ultimate intention and goal . . . [was] to goad the jury into any determination under [section] 3344 and thereby unlock the door to the largess of attorney's fees provided by that statute."

In fact, the only examples given by Peter are of evidence which he *concedes* falls short of demonstrating any violation of section 3344. For example, in the case of an allegation Phillip made relating Peter's attempt to arrange a direct deposit of Phillip's money, Peter asserts only that Phillip "attempts to satisfy [section] 3344's requirement . . . but comes up short . . . ." In another example, Peter asserts that Phillip's mere mention of Peter's "forgery" of his name was an attempt to "aim[] squarely at the signature aspect of [section] 3344." He claims that "had the jury believed this charge, they would have returned a verdict under the [section] 3344 statute." But that simply isn't true. The mere unauthorized use of another's signature does not qualify as a violation of section 3344. Only the use of that signature in connection with "products, merchandise or goods" would qualify, and Peter does not contend that Phillip made *that* allegation.

Nor did Phillip's use of California Approved Civil Jury Instruction (CACI) No. 1803 demonstrate that he was asserting such a claim. The instruction is specifically made to be used whether a plaintiff is asserting the common law tort of invasion of privacy *or* a claim under section 3344. Phillip clearly *was* asserting the former, and thus the use of the instruction would not necessarily imply he was attempting to assert the latter. And, of course, the complete lack of any evidence supporting the latter demonstrates rather clearly that he was not.

Peter also contends "the jury heard extensively about the $750 issue" – presumably meaning the $750 statutory penalty available to a plaintiff who establishes a violation of section 3344. However, the only evidence Peter cites in support of this contention is his own trial counsel's argument to the effect that Phillip was seeking such a statutory penalty amount. There is no evidence, however, that Phillip himself actually did seek such a penalty – nor is there any reason to believe that if he had, and the jury had awarded it, such an award would have survived a challenge on appeal. Having failed to

plead, let alone prove any violation of section 3344's rather specific provisions, Phillip simply would not have been entitled to recover thereunder.

Which brings us to Peter's final point: the assertion that if *Phillip* had prevailed, he "would have been entitled to attorney's fees!" This is simply not true. Had Phillip prevailed on the claim he pleaded – alleging only that Peter had used his name and signature to engage in financial transactions without his consent – he would not have been entitled to attorney fees under section 3344. Absent some allegation, and supporting evidence sufficient to prove it, that Peter had used his name or signature "on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services" (§ 3344, subd. (a)), Peter would be no more entitled to an award of attorney fees than Peter was in the wake of the initial judgment. And that is not at all.

The order is affirmed. Phillip is to recover his costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.